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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re C.G., et al., Persons Coming
Under the Juvenile Court Law.

B293037

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. 18LJJP00573A-B)

Plaintiff and Respondent,

v.

TRENTON G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Steven E. Ipson, Juvenile Court Referee. Reversed in part, affirmed in part.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Father's four-year-old daughter, C.G., was repeatedly sexually abused by her maternal grandfather while living with her mother (Mother). As a result, the juvenile court removed C.G. and Father's other child, Cameron, from Mother's home. Father initially refused to allow the children to live with him, but subsequently changed his mind. The juvenile court asserted jurisdiction over the children based on Mother's failure to protect and Father's unwillingness to care for the children. It then removed the children from their parents' custody pursuant to Welfare and Institutions Code section 361, subdivision (c). On appeal, Father contends the court's jurisdictional findings related to his conduct are not supported by substantial evidence. He also contends that, because he was a noncustodial parent, the court should have considered placing the children with him pursuant to Welfare and Institutions Code section 361.2, subdivision (a), rather than removing them from his custody under section 361, subdivision (c). We agree with Father on both points but find the court's application of the wrong statute was harmless error. Accordingly, we reverse the jurisdictional findings and affirm the dispositional orders.

FACTUAL AND PROCEDURAL BACKGROUND

Referral and Investigation

Mother and Father have two children together, four-year-old C.G. and two-year-old Cameron. The children are the result of an affair between Mother and Father that occurred while Father was married to his current wife. The children have never lived with Father, and he has never been their primary caregiver.

Around July 2018, C.G. disclosed that maternal grandfather kissed her, put his penis in her mouth, and licked her between her legs. C.G.'s maternal great uncle reported the

abuse to the police. He said Mother refused to contact the police because she had adopted a strange ideology and does not believe in government. Mother was generally uncooperative with the investigating police officers, who reported the incident to the Los Angeles County Department of Children and Family Services (DCFS).

Mother denied to DCFS that she had any reason to suspect maternal grandfather was abusing C.G. She said she first learned of the abuse after questioning C.G. about her visits with him. Mother said she was concerned that maternal grandfather was bathing C.G. because he was known to use soap on children's vaginas. Mother refused to take C.G. to a scheduled forensic examination or have her seen by a doctor.

Maternal great grandmother told DCFS the children were often left alone with maternal grandfather during the day. She said C.G. frequently talked about being sexually abused, which she believed had been ongoing for weeks or even months. C.G. told maternal great grandmother that Mother knew about the abuse.

According to maternal great grandfather, Mother told him that maternal grandfather sexually abused her as a child and she had an inkling he was abusing C.G. Two other adult relatives also disclosed that they had been sexually abused by maternal grandfather as children. One of those relatives had warned Mother not to allow her children to be alone with him. Mother denied having been abused and denied knowing that other relatives had been abused prior to C.G.'s disclosure.

The juvenile court removed the children from Mother's home and they were placed in foster care. The foster parent reported that C.G. acted out sexually on multiple occasions,

including with another child. She further reported that C.G. and Cameron had lice and rotting teeth.

DCFS inquired into whether the children could live with Father, but he refused. Father explained that his wife was not happy that he fathered the children during an affair, and having the children in his home would cause marital discord and would disrespect his wife. Father had previously told Mother he could not care for the children because of his wife and that she wanted the children to take a paternity test.

Father urged DCFS to release the children to Mother, whom he described as a “good mother.” Father said he did not think C.G. had any “issues or problems,” and did not see a need for the child or Mother to participate in services. Father was concerned that if C.G. attended counseling, it would cause her to start having problems and make things worse. Father did not want C.G. to undergo a forensic examination or be examined by a doctor.

Petition

On August 31, 2018, DCFS filed a petition asserting C.G. and Cameron are persons described by Welfare and Institutions Code section 300, subdivisions (b)(1), (d), and (j).¹ The petition alleged that maternal grandfather sexually abused C.G., Mother was aware of the abuse, and Mother failed to protect C.G. by allowing maternal grandfather unlimited access to her. With respect to Cameron, the petition alleged his sibling was abused and there is a substantial risk he will be abused as well.

¹ All future undesignated statutory references are to the Welfare and Institutions Code.

On September 18, 2018, DCFS filed an amended petition, which added two counts under section 300, subdivision (b)(1). The first new count alleged Mother has mental and emotional problems that interfere with her ability to provide appropriate care for the children. The other count alleged Father is “unwilling to provide care and supervision” of the children.

Combined Jurisdiction and Disposition Hearing

The court held a combined jurisdiction/disposition hearing on September 24 and 25, 2018. Father testified that he was now able to take the children into his care. He said he had spoken to his wife and had no reason to believe she would hold any resentment towards the children or threaten their safety. According to Father, before the children were detained, he would typically visit them once or twice a week for a few hours each time. Father had not had any visits with the children that month and had not attempted to contact the social worker to arrange one.

At the conclusion of Father’s testimony, his counsel asked the court to dismiss the petition in its entirety. The children’s counsel joined DCFS in asking the court to sustain all the allegations. After considering the evidence and arguments, the court struck the count related to Mother’s mental health issues and sustained the remaining allegations in the petition.

As to disposition, Father’s counsel urged the court to return the children to Mother’s custody. Alternatively, counsel asked that the children be returned to Father, who was now ready to have the children in his home. Minor’s counsel responded that the evidence showed Father is not ready to receive the children and there will be discord if they live in his home. Counsel further

argued that Father's lack of insight poses a continuing risk to the children.

The court declared the children dependents of the court.

As to removal and placement, the court stated:

"The court does find by clear and convincing evidence pursuant to [section] 361(c), there is a substantial danger if the children were returned home to the physical health, safety, physical and emotional well-being. There is no reasonable means by which the children's physical and emotional wellbeing can be protected without removing the minors from the parents' custody. [¶] With regards to the mother, the failure to protect had not been remedied.

With regard to the father, it appears that he has limited insights, that he has only recently changed his position that he would accept the children, and he has a limited relationship with the children. [¶] So reasonable efforts were made to prevent and eliminate the need for removal. At this time [the] court orders care, custody, control and conduct of the children to be placed under the supervision of the Department of Children and Family Services."

The court further ordered monitored visits and reunification services for Father.

Father timely appealed.

DISCUSSION

I. There Is Not Substantial Evidence Supporting the Jurisdictional Findings Related to Father's Conduct

Father contends, and DCFS concedes, that the juvenile court's jurisdictional findings related to Father's conduct are not supported by substantial evidence. (See *In re Kristin H.* (1996)

46 Cal.App.4th 1635, 1654 [a juvenile court’s jurisdictional findings are reviewed for substantial evidence].) We agree.

With respect to Father, the petition alleged the court had jurisdiction based exclusively on his “unwillingness” to care for and supervise the children. Although Father initially indicated he did not want the children to live in his home, at the jurisdiction hearing, he testified that he was now willing to care for the children. The juvenile court apparently determined Father’s testimony was credible, as it subsequently found, in connection with its dispositional orders, that Father changed his mind about accepting the children into his home. Because there is no other evidence indicating Father was “unwilling” to care for or supervise the children, we reverse the juvenile court’s order sustaining the allegations in the petition related to Father’s conduct.²

II. The Court’s Failure to Consider Placing the Children with Father under Section 361.2, Subdivision (a), Was Harmless Error

Father asserts the juvenile court erroneously removed the children from his custody pursuant to section 361, subdivision (c). He contends that, because he was a noncustodial parent, section 361, subdivision (c) was inapplicable and the court should have considered placing the children with him pursuant to section 361.2, subdivision (a). We agree with Father that the juvenile

² Although we reverse the jurisdictional findings related to Father’s conduct, the juvenile court will retain jurisdiction over the children based on the unchallenged jurisdictional findings related to Mother’s conduct. (See *In re I.J.* (2013) 56 Cal.4th 766, 773–774; *In re A.R.* (2014) 228 Cal.App.4th 1146, 1150.)

court applied the wrong statute. Nonetheless, we conclude reversal is not necessary because the error was harmless.

Section 361, subdivision (c), provides that a child shall not be taken from the physical custody of a parent “with whom the child resides at the time the petition was initiated” unless the court makes certain findings, including that there would be a “substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor” (§ 361, subd. (c)(1).)

If the court removes a child from a custodial parent, section 361.2 establishes the procedures the court must follow when determining where to place the child. (*In re Phoenix B.* (1990) 218 Cal.App.3d 787, 792.) Subdivision (a) of section 361.2 provides that the court “shall first determine” whether there is a parent who wants to assume custody who was not residing with the minor at the time the events that brought the minor within the provisions of section 300 occurred. If so, the court “shall place” the child with the parent unless “it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.” (§ 361.2, subd. (a).) The court’s findings under both section 361, subdivision (c), and section 361.2, subdivision (a), must be made by clear and convincing evidence. (§ 361, subd. (c); *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829 [“to comport with the requirements of the due process clause, a finding of detriment pursuant to section 361.2, subdivision (a) must be made by clear and convincing evidence”].)

Here, the parties apparently agree that section 361, subdivision (c) did not apply to Father because he was a noncustodial parent with whom the children did not reside at the time the petition was initiated. They also agree that after the court removed the children from Mother's custody, it should have considered whether to place them with Father pursuant to section 361.2, subdivision (a). However, the juvenile court stated it was removing the children from both parents' custody pursuant to section 361, subdivision (c). There is also nothing in the reporter's transcript to suggest the court considered placing the children with Father pursuant to section 361.2, subdivision (a), despite his expressed desire to assume custody of them. This was error.

DCFS suggests the court's minute orders from the disposition hearing demonstrate it actually considered placing the children with Father and made the requisite findings under section 361.2, subdivision (a). In support, it points to language in the orders that tracks language found in section 361.2, subdivision (a): "The Court further finds that it would be detrimental to the safety, protection, or physical or emotional well-being, and special needs, if applicable, of the child to be returned to or placed in the home or the care, custody and control of that or those parent(s)/legal guardian(s)." The minute orders do not, however, specifically cite section 361.2, subdivision (a). Moreover, the particular language upon which DCFS relies appears in a section of the orders that purports to make numerous dispositional findings under various statutory provisions—among them section 361, subdivisions (a)(1), (c), and (d), and section 362, subdivision (a)—without specifying which provisions are applicable to the case at hand or to whom they

apply. In light of the court’s explicit statements at the hearing, we do not find this “boilerplate” language sufficient to show the juvenile court actually considered placing the children with Father pursuant to section 361.2, subdivision (a).

Although the juvenile court erred in failing to consider whether to place the children with Father under section 361.2, subdivision (a), reversal is required only if the error was prejudicial. (See *In re D’Anthony D.* (2014) 230 Cal.App.4th 292, 303 [erroneous failure to apply section 361.2, subdivision (a), subject to harmless error analysis]; *In re Abram L.* (2013) 219 Cal.App.4th 452, 463 [same]; Cal. Const., art. VI, § 13 [“No judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice”]; but see *In re V.F.* (2007) 157 Cal.App.4th 962, 973 [refusing to make implied findings under section 361.2, subdivision (a), even though the court’s findings under section 361, subdivision (c)(1) would “arguably” support a finding of detriment] superseded on other grounds as stated in *In re Adriana* (2008) 166 Cal.App.4th 44, 57–58.) An error is prejudicial if, after examination of the entire case, “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*In re Julien H.* (2016) 3 Cal.App.5th 1084, 1089.) Here, any error was harmless.

In re D’Anthony D., *supra*, 230 Cal.App.4th 292, is instructive. In that case, like this one, the juvenile court erroneously removed a child from a noncustodial parent under section 361, subdivision (c), and failed to consider placement with

the parent under section 361.2, subdivision (a). On appeal, the court found the error harmless, explaining that, “in assessing whether this error was prejudicial, we can neither ignore the similarity between these statutes’ mandatory findings, nor disregard the evidence supporting the court’s ‘substantial danger’ finding concerning placement with father.” (*In re D’Anthony*, at p. 303.)

The same is true here. The juvenile court explicitly found there would be substantial danger to the children if “returned” to Father’s home, and there were no means to protect the children’s physical and emotional well-being absent removal. In support, the court noted, among other things, that Father lacked insight and only recently showed a willingness to accept the children into his home. Although the court’s findings do not perfectly mirror those required under section 361.2, subdivision (a), we suspect that in most, if not all, cases in which a court finds “substantial danger” to a child’s “physical health, safety, protection, or physical or emotional well-being” if returned to the parent’s home, it would also find placement with that parent to be “detrimental” to the child’s “safety, protection, or physical or emotional well-being.” (See *In re A.A.* (2012) 203 Cal.App.4th 597, 610 [“It is illogical to require a court to consider placing a child with a noncustodial parent who has already been determined to pose a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor.”].) We are confident this is one of those cases given the substantial evidence supporting the juvenile court’s “substantial danger” findings equally support a finding of “detriment” under section 361.2, subdivision (a).

The evidence shows that, until very recently, Father would not allow the children to live in his home because it would be disrespectful to his wife and cause marital discord. Father's wife also wanted the children to undergo paternity tests, which indicates she did not want Father to have a relationship with them. Although Father testified at the jurisdiction hearing that he was no longer concerned about these issues, he failed to specifically explain how he resolved them in such a short period of time. It is reasonable to conclude, therefore, that Father's wife would continue to resent the children and their presence in his home would cause marital discord. Placement with Father under such circumstances would be detrimental to the children's emotional well-being.

Evidence of Father's general lack of insight also supports a finding of detriment. Father described Mother as a good parent and insisted she maintain custody of the children free of the juvenile court's jurisdiction, despite the overwhelming evidence that she allowed a known sexual predator of young children to have ongoing access to their four-year-old child. Equally concerning, Father indicated he did not think C.G. was having issues or needed services, even in light of reports that she was constantly talking about the abuse and acting out sexually. Father, in fact, was of the belief that counseling would actually make things worse for the child. Father also agreed with Mother not to take C.G. to see a doctor or undergo a forensic exam, even though they might reveal physical injuries to the child. From this evidence, it is reasonable to conclude that Father lacks the insight necessary to properly care for a young child that was very recently sexually abused, and placing the children in his home would be detrimental to their physical and emotional well-being.

Given the similarities in the section 361, subdivision (c) and 361.2, subdivision (a) standards, coupled with the substantial evidence supporting the juvenile court’s “substantial danger” findings, it is not reasonably probable that the juvenile court would have reached a more favorable result to Father had it considered placing the children with him pursuant to section 361.2, subdivision (a). The juvenile court’s error was harmless and does not warrant reversal.³

DISPOSITION

The jurisdictional findings related to Father’s conduct are reversed. The dispositional orders are affirmed.

BIGELOW, P.J.

We concur:

STRATTON, J.

WILEY, J.

³ Father briefly contends he was prejudiced by the court’s application of the wrong statute because it resulted in the children being removed from his custody. This is not the test for prejudice. Even if it were, Father maintains he was a noncustodial parent as of the disposition hearing. As a result, the court’s order “removing” the children from his custody had no practical effect and caused him no harm.